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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SAN MATEO

19 SIX4THREE, LLC, a Delaware limited liability
20 company,

21 Plaintiff,

22 v.

23 FACEBOOK, INC., a Delaware corporation;
24 MARK ZUCKERBERG, an individual;
25 CHRISTOPHER COX, an individual;
26 JAVIER OLIVAN, an individual;
27 SAMUEL LESSIN, an individual;
28 MICHAEL VERNAL, an individual;
29 ILYA SUKHAR, an individual; and
30 DOES 1-50, inclusive,

31 Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S BRIEF
RE: COURT'S ORDER DATED NOVEMBER
20, 2018**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
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I. INTRODUCTION

As this Court has already recognized, Mr. Kramer and his counsel explicitly admit they breached this Court’s protective and sealing orders and destroyed evidence. What remains is to identify just how extensive that breach was, so that the Court can order all necessary remedies and issue all appropriate sanctions. All the more because Six4Three’s explanation of these events raises more questions than it answers.

At the outset, Six4Three asks the Court to accept a narrative that is improbable as a matter of common sense and inconsistent with the documents and public facts that are available so far. For example:

- Mr. Kramer asks the Court to believe that Six4Three was put in an “untenable” situation by the Digital, Culture, Media and Sport Committee (“DCMS Committee”) while Mr. Kramer was traveling to the United Kingdom for business. In so doing, he asks the Court to ignore that:
 - Six4Three had been in contact with Mr. Collins and the DCMS Committee since at least October 1, without notifying Facebook or the Court, even at the October 11 hearing on the motions to seal the very materials at issue.
 - While Mr. Kramer gives no information about the business he was in the United Kingdom to undertake, he happened to choose a hotel that is approximately 1500 feet from the House of Parliament and Portcullis House (where the DCMS Committee sits and Members of Parliament offices are located).
 - Six4Three actually **invited** the DCMS Committee to request documents produced in this litigation and to issue a subpoena purporting to compel their production. ~~See~~ Declaration of Theodore Kramer in Support of Plaintiff’s Brief in Response to November 20, 2018 Order (“Kramer Decl.”) Ex. 1 at 1 (“Finally, I have attached a document that should assist you and your committee as you approach Facebook for documentation and evidence related to the company’s handling of user data since January 1st, 2012. Carole recommended we send it to you.”) (attaching a document entitled “Requests for Production_six4three.pdf”, which Six4Three has not yet disclosed to the Court or

Facebook); *see also* *id.* 3 (“I can confirm that your description of the documents in my possession is accurate. . . . I will agree to accept service of a subpoena.”).

- Mr. Kramer asks the Court to believe that, between the time this Court ordered him not to turn the documents over the DCMS Committee and the time he did so (two days later), Mr. Kramer was sufficiently concerned about the legal consequences of declining to provide the documents to the DCMS Committee that he would risk a contempt finding by this Court, even though by his own account:
 - Mr. Kramer did not seek legal advice from his lawyers (or lawyers with expertise in parliamentary procedure) about the predicament he claims to have found himself in. Indeed, although Mr. Kramer purports to have “immediately” notified his lawyers upon receiving the first two DCMS Committee orders, he did not think to notify them before taking the documents to Parliament.
 - Mr. Kramer allegedly arrived unannounced to the House of Commons and asked to see a Member of Parliament, where he “intended to convince Mr. Collins that he could not force me to turn over documents subject to the Protective Order.” Although he “did not intend to comply with the DCMS Orders,” he brought with him from his nearby hotel an untold number of confidential and highly confidential Facebook documents he should not even have had access to, along with a thumb drive for copying the documents.
 - Already knowing that he was subject to contempt of this Court’s orders, Mr. Kramer was apparently more concerned with being held in contempt of the DCMS Committee and searched his cache of documents for documents to provide to the DCMS Committee. He claims he did “not know whether [he] was free to leave the location, or if [he] had been allowed to leave, if [he] would be permitted to fly home to the United States,” but apparently still did not think to ask to speak to his counsel or even to ask whether he was being held against his will by the Member of Parliament (who presumably has no authority to hold a foreign national that had not been charged with or convicted of any crime).

- 1 o Although he had been concerned about the consequences of being held in contempt of
2 Parliament and knew he was subject to being held in contempt by this Court, after handing
3 over an unidentified set of Facebook’s confidential documents to the DCMS Committee,
4 he allegedly left the United Kingdom without contacting his counsel. He flew home and
5 enjoyed Thanksgiving with his family without contacting counsel. He waited until two
6 days later to even let his counsel, let alone the Court or Facebook, know that he had
7 disclosed confidential documents to the DCMS Committee in violation of this Court’s
8 orders.
- 9 • Six4Three’s counsel asks the Court to believe that, upon learning of all of this, counsel was
10 “vexed” by Mr. Kramer’s actions, but decided the wisest course of action was to instruct Mr.
11 Kramer to spoliage evidence by **deleting** the Dropbox cache on his computer, notwithstanding
12 that:
- 13 o According to Six4Three, the Dropbox cache would have been the only available record of
14 what files Mr. Kramer accessed while he was meeting with the DCMS Committee, since
15 Mr. Kramer claims he has no memory of what he copied for the DCMS Committee.
16 Counsel did not ask the Court or Facebook for input on this issue or even disclose this fact
17 to the Court or Facebook until three days later, with Six4Three November 26, 2018
18 submission.
- 19 • Six4Three’s counsel asks the Court to believe that they had no idea that Mr. Kramer had access to
20 confidential or highly confidential Facebook information until Facebook raised a concern on
21 November 19, even though:
- 22 o The documents were produced only to Six4Three’s counsel and thus could not have gotten
23 to Mr. Kramer unless Six4Three’s counsel provided them to him (directly or indirectly).
- 24 o Mr. Kramer had confirmed to Mr. Collins on November 4 that he had “in [his]
25 possession” unredacted copies of, among other things, Six4Three’s Corrected
26 Memorandum of Points and Authorities in Opposition to Defendants’ Special Motions to
27 Strike (Anti-SLAPP) filed on May 18, 2018; the Godkin Anti-SLAPP Declaration; and
28 Exhibits 1-212 to the Godkin Anti-SLAPP Declaration filed on May 18, 2018. See

1 Kramer Decl. Ex. 3 (saying “I can confirm that your description of the documents in my
2 possession is accurate” in response to a request from Mr. Collins that Mr. Kramer provide
3 **unredacted** copies of the Six4Three’s opposition brief, the Godkin Declaration, Exhibits
4 1-212 to the Godkin Declaration, and “[a]ll documents containing summaries or analyses
5 of any of the exhibits to the Godkin Anti-SLAPP Declaration filed on May 18, 2018.”).

6 And even accepting the above, a number of questions arise from Six4Three’s submission. By
7 way of example, one wonders:

- 8 • Who was involved in and had knowledge of Six4Three’s communications with *The Guardian* and
9 the DCMS Committee and to what extent? What was in the “summary” Six4Three gave to the
10 DCMS Committee? Who prepared the list of document requests for the DCMS Committee and
11 what was on the list?
- 12 • How did Mr. Kramer get access to Facebook’s highly confidential information in violation of the
13 protective order? Who set up the Dropbox? When? What documents were on it last week?
14 What documents have been on it since it was set up? When did Mr. Kramer set up the syncing
15 between the Dropbox folder and his computer?
- 16 • Who else had access to the Dropbox containing Facebook’s highly confidential information?
17 Who accessed it? When?
- 18 • What happened between the August 28, 2018 meeting between Mr. Kramer and *The Guardian*
19 Carole Cadwalladr (at which she reportedly said she would like to raise this case with Damian
20 Collins) and the October 1, 2018 email Mr. Kramer sent to Mr. Collins in which he sent Mr.
21 Collins a list of litigation documents the DCMS Committee should request, he says at Ms.
22 Cadwalladr’s suggestion?
- 23 • Why were the Court and Facebook not given notice of the DCMS Committee’s request for
24 documents (as invited by Six4Three) until November 19, 2018?
- 25 • Why did Mr. Kramer travel to the United Kingdom with Facebook’s confidential and highly
26 confidential information in the first place?
- 27 • Exactly what documents were provided to the DCMS Committee?

- Why did Six4Three’s counsel instruct Mr. Kramer to delete the Dropbox and local copies of it? Were any steps taken to preserve evidence of the contents of the Dropbox, including who accessed those documents, or what documents Mr. Kramer copied to the thumb drive he gave to the DCMS Committee?
- Why did Mr. Kramer fail to notify his own counsel or Facebook at the time he provided the documents to the DCMS Committee in direct violation of this Court’s various orders?
- What other violations of the protective order have occurred?

Facebook requests prompt discovery and an order to show cause so that Facebook—and more importantly the Court—can get to the bottom of what actually happened here.

II. THE COURT SHOULD GRANT DISCOVERY AND ISSUE AN ORDER TO SHOW CAUSE AND PROMPTLY CONDUCT CONTEMPT PROCEEDINGS

The Court’s November 20, 2018 Order for Briefing and Staying Submission of Unredacted Copies of Sealed Documents (“November 20 Order”) posed a number of specific questions as to the authority of the DCMS Committee to compel production of confidential and sealed materials from this litigation. Many of those questions have been overtaken by Six4Three and its counsel’s knowing decisions to violate the Court’s orders in the interim, but Facebook addresses them in Sections III and IV below. First, however, Facebook addresses the admissions in Six4Three’s November 26 submission.

A. Six4Three and its Counsel Admit They Have Violated This Court’s Order

As the Court’s November 27, 2018 Order and Notice of Hearing Concerning Matters Subject to this Court’s Sealing and Protective Orders and Order Issued November 20, 2018 (“November 27 Order”) determined, it is undisputed that Six4Three, Mr. Kramer, and counsel have violated this Court’s orders. At the outset, “Mr. Kramer admits he produced documents subject to the Sealing and Protective Orders from a DropBox account and in violation of the Order.”¹ November 27 Order at 2. Beyond that, Mr.

¹ Of course, the breach did not stop with the **disclosure** of the confidential and sealed documents to the DCMS Committee. On Tuesday, the DCMS Committee held a public, widely-publicized hearing in which the documents disclosed by Mr. Kramer were actually **used** to question a Facebook representative. For example, the Court may recall Exhibit 153 to the Godkin Declaration—an email chain in which a Facebook engineer mistakenly thought calls to Facebook’s servers from Pinterest were originating in Russia, but then quickly realized his mistake and advised it was a false alarm. The first part of the email

Gross has admitted that “documents designated as highly confidential under the Protective Order, as well as summaries of such documents, had been placed in a folder located in Six4Three’s dropbox account over which Mr. Kramer had access,” which itself, despite counsel’s transparent use of the passive voice to avoid responsibility, is a separate violation of the Protective Order. Declaration of Stuart G. Gross in Support of Plaintiff’s Brief in Response to November 20, 2018 Order (“Gross Decl.”) ¶ 7. These are just the violations that Six4Three has admitted to. The remainder of its November 26 submission only heightens concerns that there are other serious violations of this Court’s orders that have not yet come to light.

B. Immediate Discovery Into the Scope and Extent of Violation of This Court’s Order Is Necessary

1. Immediate Document Discovery and Cross-Examination (Via Live Evidentiary Hearing) Are Necessary

As set forth in Facebook’s November 26 Ex Parte Application For Expedited Relief Re Six4three’s Contempt, Including An Order To Show Cause (“November 26 Ex Parte Application”), immediate document discovery and cross-examination of the relevant individuals is necessary to get to the bottom of Six4Three’s violation of the Court’s orders. Facebook does not repeat here its argument with respect to the scope of discovery that is necessary, but addresses two supplementary points.

First, based on the revelations in Six4Three’s November 26 submission, Facebook respectfully submits that the Court and Facebook needs the following discovery beyond that previously requested in Facebook’s November 26 Ex Parte Application to determine the scope of the breaches:

- The three attachments to Mr. Kramer’s October 1, 2018 email to Damian Collins. *See* Kramer Decl. Ex. 1.
- All logs or other records pertaining to the Six4Three Dropbox account that Mr. Kramer accessed from his laptop, including all available or recoverable information about what documents were

chain was raised during Tuesday’s hearing, forcing Facebook to release the entire Exhibit 153 to provide the media and public with appropriate context. *See* <https://www.cnn.com/2018/11/27/tech/facebook-hearing-damian-collins/index.html> (“Later on Tuesday, Facebook released a copy of the email chain with the engineer’s warning. The full chain showed that the engineer appears to have been mistaken. . . . It is not clear if the committee had access to the entire chain or just the emails in which the engineer initially raised the false alarm. CNN has asked the committee to clarify.”).

1 uploaded to the account and by whom, what documents were downloaded from the account and
2 by whom, what documents were deleted from the account and by whom, when the account was
3 cached or synched locally and on what devices, and all individuals that had access to the account
4 and when.

- 5 • All emails or other communications amongst and between Mr. Gross or anyone at Gross & Klein,
6 Mr. Godkin or anyone at Birnbaum Godkin, Mr. Kramer, Mr. Scaramellino or any other agent,
7 attorney, or individual associated with Six4Three from May 21, 2018 to the present regarding
8 Facebook's confidential or highly confidential information. For avoidance of doubt, this would
9 include without limitation communications relating to contacts with the DCMS Committee, *The*
10 *Guardian* or other third parties. To the extent Six4Three may previously have purported to assert
11 a claim of privilege over such communications, any such claim is non-viable for the reasons set
12 forth below in Section II.B.2.
- 13 • A forensic analysis of Mr. Kramer's laptop and the thumb drive (if it is still in his control), as
14 well as the computers and/or electronic devices of Six4Three's counsel and any other individual
15 that had access to Six4Three's Dropbox account.

16 **Second** that Six4Three and its counsel produce the requested discovery by 5:00 p.m. on
17 November 29, 2018 or, in view of the November 30 hearing, by 5:00 p.m. on Monday, December 3. In
18 particular, Six4Three's suggestion that it should be given until **December 28** to produce discovery should
19 be rejected in these circumstances. *See* Plaintiff's Limited Response, In Part, to Defendants' Ex Parte
20 Application for Expedited Relief re Six4three's Contempt, Including an Order to Show Cause at 3.
21 Given counsel's admission that he directed the destruction of critical evidence relating to these matters,
22 delaying the production of relevant information by another month only risks that additional relevant
23 information will be lost or destroyed. Moreover, Mr. Kramer has already said he cannot remember the
24 materials he turned over to DCMS Committee just last week—delaying depositions until January (which
25 would be necessary if the documents are not even produced until December 28) risks further claims that
26 memories have faded. *See* Kramer Decl. ¶ 18. And perhaps most importantly, delaying discovery
27 impedes the Court and Facebook learning the true extent of disclosure of Facebook's confidential
28 information—delaying any potential remedial measures and risking further disclosures with every

1 passing day. Against that backdrop, there is no good reason that discovery should not proceed
2 immediately. And Six4Three has not offered any.

3 **2. Depositions of Six4Three's Counsel Are Essential**

4 The depositions of Six4Three's counsel are essential. There is no dispute that the Court and
5 Facebook are in this predicament **solely** because Six4Three's counsel violated the Stipulated Protective
6 Order and granted Mr. Kramer access to documents that he should not have had access to **But for**
7 **counsel's violation of the Stipulated Protective Order, Mr. Kramer's subsequent**
8 **Court's Orders never could have occurred.** Mr. Kramer and Mr. Gross have both attested
9 that Mr. Kramer destroyed evidence relating to his violation of the Court's order **at the direction of**
10 **counsel.** See Kramer Decl. ¶ 24; Gross Decl. ¶ 11.

11 As Six4Three concedes, a party may depose opposing counsel where: (1) counsel's testimony is
12 not privileged; (2) the testimony is crucial to the case; and (3) there is no other way to get the
13 information. *Spectra-Physics, Inc. v. Superior Court (Teledyne Inc.)*, App. 3d 1487, 1496
14 (1988). Here, there is no privilege for two reasons.

15 **First** Six4Three expressly waived privilege over communications relating to these issues by
16 disclosing a limited set of communications that it apparently believes are favorable. *Jones v. Superior*
17 *Court (Benny)*, 19 Cal. App. 3d 534, 547–48 (1981), *disapproved of on other grounds by Williams*
18 *Superior Court (Marshall's of CA, LLC)*, 5th 531, 557 n.8 (2017) ("Where the disclosure sought is
19 so related to the disclosure already made that the [privilege holder] could not reasonably retain a privacy
20 interest in preventing it, then the purpose of the privilege no longer exists, and it may be said that the
21 privilege has been waived."); *see also Chicago Title Ins. Co. v. Superior Court (Cal. Canadian Bank*
22 *174 Cal. App. 3d 1142, 1151 (1985) (holding that when plaintiff placed at issue its knowledge of the*
23 *alleged fraud, it waived attorney-client privilege as to all communications between plaintiff and its*
24 *employees related to that knowledge); Garcia v. Progressive Choice Ins. Co.*, No. 01-CV-466-BEN
25 (NLS), 2012 WL 3113172, at *4–*7 (S.D. Cal. July 30, 2012) (applying California privilege law to
26 conclude that the disclosure of certain privileged emails relating to an insurance claim waived privilege
27 as to other emails involving the same insurance claim). Indeed, Six4Three has offered up its
28 communications on four broad categories of information that are necessary to determine what happened

here. It is critical to note that Six4Three, **not Facebook**, bears the burden of establishing privilege, and it made no effort to do so in any of its papers.

- As to who created the Dropbox account at issue, what controls were enabled (or not), and when Mr. Kramer and others accessed it, Six4Three waived privilege as to where, when, and how they learned about the relevant facts. Counsel claims they did not learn that Mr. Kramer had access until November 20, 2018. Gross Decl. ¶ 7; Godkin Decl. ¶ 6. But that is contrary to Mr. Kramer’s sworn declaration under penalty of perjury that **in May 2018** told a reporter that the documents were “stored on a file server in the cloud.” Kramer Decl. ¶ 3. Counsel **never** claim that they were unaware of this communication.
- As to counsel’s communications relating to Mr. Kramer about his access to the Dropbox account, his review of Facebook’s documents, and “confirmation” that Mr. Kramer had not reviewed the documents, counsel again waived privilege. Counsel openly states that they “confirmed Mr. Kramer had never reviewed any documents designated as highly confidential.” Gross Decl. ¶ 8; Godkin Decl. ¶ 8. Counsel also argues that they did not know that the Dropbox was set up to synch to the laptop that was in Mr. Kramer’s possession. Gross Decl. ¶ 8; Godkin Decl. ¶ 9. Again, counsel’s arguments are contrary to the documents. On November 4, 2018, weeks before Six4Three notified the Court or Facebook of the DCMS Committee’s demands, Mr. Kramer wrote to the DCMS Committee: “I can confirm that your description of the documents **in my possession** accurate. These documents are subject to confidentiality under the protective order” Kramer Decl. Ex. 3 (emphasis added). Notably Six4Three’s counsel claims ignorance of some communications but **not** this one.
- As to counsel’s communications relating to the sharing of documents with the DCMS Committee, counsel now claims that they did not learn of it until November 23, 2018. Gross Decl. ¶¶ 9–10; Godkin Decl. ¶ 17. Counsel states that they made efforts to prevent “Mr. Kramer from taking such actions.” Gross Decl. ¶ 10. Of course, counsel has not attached **any** documents or records of communications showing that they were either surprised by the disclosure or that there was **a single** instruction to Mr. Kramer not to make it. Rather, counsel simply claims that his

administrative assistant forwarded his communications with the Court and the DCMS Committee to Mr. Kramer. *See* Godkin Decl. ¶¶ 4, 11, 13.

- Finally, as to the destruction of documents, counsel admits that they directed the destruction of key evidence: the Dropbox that Mr. Kramer used to synch documents, to search documents, and to disclose documents. Gross Decl. ¶ 11.

Second Mr. Kramer’s communications show a coordinated effort—with input from counsel—to circumvent at the very least this Court’s order sealing the documents at issue. Thus, even if Six4Three had not waived privilege on these subjects by putting communications between counsel and Mr. Kramer directly at issue in the three declarations submitted on November 26, the crime-fraud exception applies here. “There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.” Cal. Evid. Code § 956(a). The facts here are more than sufficient to make out a prima facie case that the services of counsel were sought and obtained “to enable or aid anyone to commit or plan to commit a crime or a fraud”—and a prima facie case is all that is required to invoke the crime-fraud exception. *State Farm & Cas. Co. v. Superior Court (Taylor)*, 14 Cal. App. 4th 625, 643 (1997), *as modified* (May 1, 1997).

Within days of this Court’s unequivocal order rejecting Six4Three’s long-standing effort to unseal these documents, Six4Three started the process of finding another way to disclose the documents. The communications from Mr. Kramer make it painfully obvious that he was working with advice of counsel. On November 4, 2018— **just three days after this Court sealed the documents** Mr. Kramer agreed to accept a subpoena from the DCMS Committee. Kramer Decl. Ex. 3. Mr. Kramer, however, explained that he would need to give notice under the protective order, which neither he nor counsel did, even though they were already in receipt of requests for documents. *Id.* Mr. Kramer also stated that a member of his legal team would need to be on any calls. *Id.* Thus, it is no surprise that neither Mr. Kramer nor counsel denies that they were working together on this communication. Similarly, neither Mr. Kramer nor counsel claims that they were not working together on communications with the media, including the meetings with *The Guardian* Kramer Decl. ¶¶ 3–4, 10, Exs. 5–6.

1 On November 12, 2018, Mr. Kramer carefully instructed the DCMS Committee that he needed
2 more than a request for voluntary disclosure; he told the Committee that he could not **voluntarily**
3 disclose the materials you have requested as they are subject to a protective order in California Superior
4 Court.” Kramer Decl. Ex. 4 (emphasis added); *see also id.* Ex. 3 (agreeing to accept service of a
5 subpoena and noting “Upon receipt of any subpoena, I would be required to notify Facebook. If
6 Facebook wishes to prevent my compliance, it will need to take action in appropriate fora.”). Again, it is
7 no surprise that there is no suggestion that this communication was written without input from counsel.
8 Indeed, Mr. Kramer does not claim that he acted without advice of counsel until November 21, 2018.
9 Kramer Decl. ¶ 15.

10 In sum, the documents show a coordinated effort by Mr. Kramer and his counsel to invite a
11 foreign Committee to issue a non-voluntary order in conflict with this Court’s orders without giving this
12 Court or Facebook notice. The “fraud” that gives rise to the crime-fraud exception includes a fraud on
13 the Court, and that is exactly what happened here. *BP Alaska Exploration, Inc. v. Superior Co.*
14 (*Nahama & Weagant Energy*, 1990 Cal. App. 3d 1240, 1263 (1988)).

15 Turning to the remaining factors that justify the depositions of counsel, testimony on these
16 subjects is critical. Without the testimony of counsel, there is no way for the Court or Facebook to get to
17 the bottom of what happened and why. Counsel only claims ignorance of some communications and not
18 others. And importantly, counsel does not claim ignorance of the many emails from weeks ago in which
19 Mr. Kramer used legalese to communicate with the DCMS Committee in an effort to kick off this entire
20 melee. It is equally noteworthy that counsel has not submitted a single document supporting their alleged
21 lack of knowledge about the Dropbox account or a single document actually instructing Mr. Kramer not
22 to disclose documents. In short, counsel is disclosing facts they like without allowing the Court or
23 Facebook to test them—a quintessential use of attorney-client communications as a sword, barring
24 reliance on privilege as a shield. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 844 F.2d 1156, 1162 (9th Cir.
25 1992).

26 **Second**, there is no other way to get this information than from counsel in depositions. Only
27 counsel knows where, what, and with whom they communicated on these subjects. Unless counsel is
28 withholding documents from the Court (i.e., purposefully not attaching relevant communications to their

1 declarations), many communications apparently were oral. And Six4Three’s decision to withhold notice
2 until the eve of the disclosure here means that there is no time for slower methods; we need to get to the
3 bottom of this now.

4 **III. RESPONSES TO THE COURT’S LEGAL QUESTIONS**

5 **A. Background on Parliamentary Select Committee Powers**

6 The DCMS Committee is a parliamentary select committee of the House of Commons. *See*
7 Miller Decl. Ex. 2 (Letter from Speaker’s Counsel to Godkin (Nov. 23, 2018)) at 1. Its powers, including
8 investigatory powers, are derived from internal parliamentary standing orders and resolutions of
9 Parliament. Gordon Decl. ¶ 5. These powers are fundamentally distinct from United Kingdom ~~law~~
10 decided and enforced by the United Kingdom courts, whose power derives from statute, the common
11 law, and equity. *Id.*

12 As such, select committee proceedings operate entirely separate from the United Kingdom legal
13 system. Gordon Decl. ¶ 12. An order from the DCMS Committee for the production of documents
14 cannot be enforced through a court of law in the United Kingdom. *Id.* Indeed, there is no process
15 recognized in the law of the United Kingdom for enforcing an order of a select committee. Gordon Decl.
16 ¶ 13. As explained in more detail below, the established process for enforcing an order of a select
17 committee to produce documents is to refer the purported breach to the House of Commons as a whole.
18 *Id.* In modern history, enforcement actions with respect to a finding of contempt of Parliament are rare,
19 and the scope of the process is uncertain and its effectiveness limited. *Id.*

20 Following from the constitutional separation of the United Kingdom Parliament and courts of
21 law, if confidential documents are disclosed to a select committee, there are no legal constraints upon the
22 use of those documents by the select committee in performance of its functions, including making the
23 documents public. Gordon Decl. ¶ 14. Because the United Kingdom courts will not intervene to restrain
24

25 ² To address the Court’s legal questions regarding parliamentary procedure, Facebook includes with this
26 brief a declaration from Richard Gordon, a practicing barrister holding the title of Queen’s Counsel. Mr.
27 Gordon is a specialist in United Kingdom constitutional and administrative law. *See* Ex. 1 to the
28 Declaration of Laura E. Miller submitted herewith (“Miller Decl.”), Declaration of Richard Gordon,
Queen’s Counsel (“Gordon Decl.”) ¶¶ 1–2.

1 the use and disclosure of confidential documents, the consequences of disclosure to the select committee
2 may be irreparable. *Id.*

3 **B. What Authority Does the DCMS Committee Have to Overrule the Court's**
4 **Without First Seeking Relief From the Court? (Question 3(a))**

5 Facebook does not understand the DCMS Committee to have expressly overruled the Court's
6 orders regarding the confidentiality of the Facebook information at issue. Rather, the DCMS
7 Committee's position is that *it* is not bound by orders of this Court. *See* Miller Decl. Ex. 2 (Letter from
8 Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2 ("It would have been wholly inappropriate for [the
9 DCMS Committee] to make prior application to a court in California, which does not exercise authority
10 over Parliament's exercise of its functions in the United Kingdom") *id.* at 1 ("We regret that we are
11 unable to brief the court directly; it would be improper for us to do so as we have no standing in the case
12 and the House of Commons is not within the jurisdiction of the court.").

13 The corollary to this position is that the DCMS Committee does not assert and cannot exercise
14 any authority over this Court and this Court is not bound by any action taken by the DCMS Committee in
15 the United Kingdom. Indeed, the DCMS Committee made this very point to Mr. Kramer when it first
16 asked for these documents, prior to Mr. Kramer's recent trip to the United Kingdom. Specifically, Mr.
17 Collins warned Mr. Kramer:

18 I should highlight that, if any disclosure of this material to the Committee
19 has consequences in the US courts, the Committee cannot protect you.
20 Committee proceedings are subject to parliamentary privilege in the United
21 Kingdom under Article IX of the 1689 Bill of Rights, but this legislation
does not have extraterritorial effect and could not be expected to be upheld
in a US court.

22 Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)). Indeed, there does not appear to be
23 any dispute that Mr. Kramer remained bound by the provisions of the Stipulated Protective Order, the
24 Court's sealing orders, and the November 20 Order, notwithstanding the requests from the DCMS
25 Committee. And yet, he still travelled to the United Kingdom (and, specifically, went to the House of
26 Commons) with a thumb drive for easy transfer of files and copies on his laptop of confidential and
27 highly confidential documents that he was not allowed access to under the terms of the Stipulated
28 Protective Order and that this Court had ordered sealed.

1 **C. What Is the Legal Effect, Under Both United States and United Kingdom**
2 **DCMS Letter to Mr. Kramer? (Question 3(b))**

3 Just as the DCMS Committee's order has no legal effect within the United Kingdom courts, *see*
4 Gordon Decl. ¶ 16, it also has no legal effect within the court systems of the United States, including the
5 California courts. As noted above, the DCMS Committee specifically warned Mr. Kramer that
6 compliance with its requests to disclose Facebook's confidential information could have consequences in
7 the United States courts. Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)).

8 **First** the cases cited by Six4Three regarding the principle of international comity have no
9 application here. The cases discussed by Six4Three all involve United States federal courts deciding
10 whether to either compel discovery from a foreign entity or issue an injunction already imposed by a
11 foreign court on a foreign entity. *See* Plaintiff's Brief in Response to November 20, 2018 Order ("643
12 Br.") at 11–12. As Six4Three itself admits, that is not the situation we have here. 643 Br. at 11 ("The
13 Supreme Court has provided a multi-factor balancing test for determining when U.S. courts should
14 exercise their authority to compel production of evidence constrained by foreign law, the inverse of the
15 situation here.").

16 Six4Three's brief also provides no guidance to the Court (or Facebook) as to why it believes this
17 doctrine applies to the potential contempt and sanctions proceedings against Six4Three, Mr. Kramer, and
18 Six4Three's counsel. Here, Mr. Kramer knowingly violated preexisting orders from this Court.
19 Six4Three's counsel also violated orders from this Court, although they deny it was knowingly. In both
20 cases, the issue at hand is whether this Court can enforce ~~its own~~ orders against the principal of the
21 **plaintiff in this lawsuit** (who also happens to be a California resident), and against lawyers appearing
22 before the Court (who are admitted in California or admitted *pro hac vice*). This has nothing to do with
23 the balancing test set forth in *Societe Nationale Aerospatiale v. United States District Court for the*
24 *Southern District of Iowa*, 482 U.S. 522 (1987), which addresses "the extent to which a federal district
25 court must employ the procedures set forth in the [Hague] Convention when litigants seek answers to
26 interrogatories, the production of documents, and admissions from a French adversary over whom the
27 court has personal jurisdiction." *Id.* at 524. Similarly, *Pilkington Brothers P.L.C. v. AFG Industries Inc.*
28 581 F. Supp. 1039 (D. Del. 1984), does not inform the matters before this Court. As Six4Three itself

notes, that case dealt with the question of “whether an American court **must** duplicate a foreign interim injunction, without reference to the underlying dispute, where there are ongoing and continuous violations of that foreign injunction.” *Id.* at 1042 (emphasis added). Needless to say, there is no foreign injunction for this Court to duplicate here. Mr. Kramer disclosed Facebook’s confidential information in willful defiance of several of this Court’s orders and the Court retains its full power and authority to address that act of contempt.

Seconds discussed above, the orders of a select committee have no legal effect outside the powers of Parliament, including in the United Kingdom courts of law. There is no foreign **law** that conflicts with this Court’s multiple orders prohibiting Six4Three (and therefore Mr. Kramer) from disclosing Facebook’s confidential information.

ThirdSix4Three’s references to the Hague Convention fare no better. The Evidence Section of the Hague Convention is expressly limited to **judicial** bodies of the signatory nations. *See* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, 23 U.S.T. 2555 (“In civil or commercial matters a **judicial authority** Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter for Request, to obtain evidence, or to perform some other judicial act.”) (emphasis added). Moreover, the DCMS Committee did not go through the specific procedures set forth in the Hague Convention, which would have given Facebook the opportunity to object and otherwise respond.

D. Is the DCMS Letter Different Than a Summons? (Question 3(c))

Put simply, the November 19, 2018 DCMS Committee letter to Mr. Kramer was not a summons. The DCMS Committee does not dispute this. *See* Miller Decl. Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)) at 2 (The letter “is not issued by a court but by Parliament.”). It is not an order under the laws of the United Kingdom. And although Mr. Kramer walked to the House of Commons to discuss the matter with Mr. Collins, the letter did not compel Mr. Kramer to do so or appear and testify. *Id.* (“The Committee did not require the personal attendance of Mr. Kramer in this case.”).

1 **E. What Issues Under the United States Constitution Are Raised by the**
2 **(Question 3(d))**

3 Facebook does not believe that the correspondence between Mr. Kramer and the DCMS
4 Committee—which Mr. Kramer initiated—directly implicates any issues under the United States
5 Constitution. Contrary to Six4Three’s assertion, Mr. Kramer’s due process rights under the United States
6 Constitution were not infringed and he has not been denied the “right to be heard.” 643 Br. at 12–13.
7 Mr. Kramer has every right to be heard by this Court, and indeed will be heard at the hearing scheduled
8 for this Friday, November 30, 2018. ~~See~~ November 27 Order at 2.

9 And although it does not implicate his due process rights under the United States Constitution,
10 under established procedures of the U.K. Parliament, before actually being found in contempt, Mr.
11 Kramer would have been given an opportunity to present his arguments before the House of Commons
12 Committee on Standards and Privileges (the “Committee of Privileges”) had he chosen to comply with
13 this Court’s orders. Gordon Decl. ¶ 19; Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel
14 (Nov. 27, 2018)); *id.* Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)) & Ex. 5 (Letter from Collins
15 to Kramer (Nov. 21, 2018)).³ There is no evidence that Mr. Kramer or Six4Three’s counsel consulted
16 counsel in the United Kingdom or did anything at all to investigate their obligations in response to the
17 DCMS Committee’s request and this Court’s orders (other than Mr. Kramer, a non-lawyer, allegedly
18 Googling parliamentary procedure). ~~See~~ Kramer Decl. ¶ 15.

19 **F. What Are the Obligations of the Court Where a House of Commons**
20 **Orders the Release of Documents in Contravention to the Court’s Orders**
21 **3(e))**

22 Facebook does not believe that the Court has any particular obligation where a select committee
23 of the House of Commons orders the release of confidential documents in contravention of the Court’s
24 orders. As discussed above, the orders of a select committee of Parliament have no legal effect in the
25 United Kingdom’s courts of law, let alone in federal and state courts of the United States. And as the
26 DCMS Committee agrees, its actions did not overrule or otherwise implicate this Court’s prior orders,
27 nor did it deprive this Court of its authority to enforce its orders. ~~See~~ Miller Decl. Ex. 2 (Letter from

28 ³ A discussion of the parliamentary practice on contempt proceedings is below.

Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2. For that reason, and the reasons addressed above, Six4Three's reliance on "the judicial principle of international comity" is again misplaced.

G. What Are the Procedures for Mr. Kramer, Who [Was] Visiting the United States on Business, to Respond or Object to the DCMS Letter Demand (Question 3(f))

Although there are no express provisions for a person directed by an order of a select committee to respond or object to such an order, modern practice would allow such a person to respond to an investigation into whether there was a contempt of Parliament prior to the full House of Commons making any finding of contempt. Gordon Decl. ¶¶ 18–19. A detailed description of contempt procedures in the House of Commons is provided in response to question 3(g) below.

Six4Three attempts to put the onus on Facebook to "defend against disclosure of designated documents in the event they are demanded under legal compulsion by a third party" with reference to Paragraph 16 of the Stipulated Protective Order. *See* Br. at 13–14. But that is not what the Stipulated Protective Order says, and Mr. Kramer was not facing "legal compulsion." ⁴ Paragraph 16 of the Stipulated Protective Order only applies to " **a subpoena or a court order issued in other litigation** that compels disclosure of any Confidential Information or Highly Confidential Information." Miller Decl. Ex. 6 ¶ 16 (emphasis added). As Facebook made clear to Six4Three's counsel immediately upon notice of the DCMS Committee letter of November 19, 2018, the DCMS Committee letter is not "a subpoena or a court order issued in other litigation." And the DCMS Committee is not a court of law, but rather a select committee of Parliament. Paragraph 16 has no application here. That said, Paragraphs 4 and 5 of the Stipulated Protective Order—which require prior written consent of the designating party

⁴ In his original letter of November 19, Mr. Godkin raised this same provision of the Stipulated Protective Order. Miller Decl. Ex. 7 (Letter from Godkin to Collins (Nov. 19, 2018)). Following the subsequent correspondence from Facebook's counsel on the same day, Six4Three's counsel apparently agreed that Paragraph 16 of the Stipulated Protective Order did not apply to the DCMS Committee's Order. Specifically, Mr. Godkin told the DCMS Committee on November 21, 2018—the day that Mr. Kramer disclosed Facebook confidential information to the DCMS Committee—that "Mr. Kramer is bound by the Protective Order and has no choice but to comply with it. In addition, the attached Order [from November 20, 2018] further prevents Mr. Kramer from transmitting, releasing or submitting unredacted copies of Plaintiff's opposition to [motions to strike] until further order of the Court, and provides that failure to comply will be considered an act of contempt." Miller Decl. Ex. 8 (Letter from Godkin to Collins (Nov. 21, 2018)).

1 before protected materials can be disclosed to any person not cleared under the Stipulated Protective
2 Order—remained applicable throughout.

3 **H. What Are the Contempt Procedures for DCMS for Non-Compliance by Mr.**
4 **Kramer? (Question 3(g))**

5 The DCMS Committee does not itself enforce its orders. *See* Gordon Decl. ¶ 13; *accord* Miller
6 Decl. Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)) at 3.

7 Rather, the established procedure for enforcing an order of a select committee is as follows:

- 8 a. The select committee must first make a special report to the House of Commons.
- 9 b. The House as a whole then debates whether to refer the matter to the Committee of
10 Privileges.
- 11 c. The Committee of Privileges decides whether or not to recommend to the full House of
12 Commons that a contempt of Parliament has been established and the suggested penalty, if
13 any.
- 14 d. The full House of Commons must then decide whether to accept the recommendation of
15 the Committee of Privileges, and, if contempt is found, determine the appropriate penalty.

16 *See* Gordon Decl. ¶ 25; *accord* Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel (Nov. 27,
17 2018)); *id.* Ex. 5 (Letter from Collins to Kramer (Nov. 21, 2018)).

18 Here, to the best of Facebook’s current understanding, the DCMS Committee reported Mr.
19 Kramer’s initial decision to abide by this Court’s orders to the full House of Commons, but no
20 subsequent action was taken against Mr. Kramer. *See* Miller Decl. Ex. 5 (Letter from Collins to Kramer
21 (Nov. 21, 2018)); *id.* Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)).

22 The elements of a contempt of Parliament finding have not been systematically defined *See*
23 Gordon Decl. ¶ 26. It is not the case that **any** failure to comply with an order for production of
24 documents automatically amounts to contempt. *Id.* Rather, the House of Commons has stated that the
25 exercise of its jurisdiction should be used “as sparingly as possible” and only when “the House is
26 satisfied that to exercise it is essential in order to provide reasonable protection for the House, its
27 Members or its officers, from such **improper** instruction as is causing, or is likely to cause, substantial
28 interference with the performance of their respective functions.” Gordon Decl. ¶ 27 (quoting Resolution

1 of the House of Commons on 6 February 1978). Here, Mr. Kramer had a compelling reason not to
2 comply with the DCMS Committee’s order in that this Court had expressly ordered him not to disclose
3 Facebook’s confidential materials, and that he would face contempt proceedings in California if he
4 complied. *See* Gordon Decl. ¶¶ 28–29.

5 Further, if Mr. Kramer or his counsel had taken the prudent measure of engaging counsel in the
6 United Kingdom (or had done basic diligence on the relevant rules), they would presumably have learned
7 that, although the House of Commons has the power to fine, admonish, or imprison in theory upon a
8 finding of contempt, that power has not been exercised in over **a century** the last fine was imposed in
9 **1666** Gordon Decl. ¶ 30, more than a century before the thirteen American colonies declared
10 independence from King George III. The last imprisonment for contempt (of a non-member of
11 Parliament) was in 1880. *Id.* Indeed, the Committee of Privileges has expressed doubt as to whether the
12 power to fine or imprison still exists. *Id.* (citing Committee of Privileges Committees’ 14th Report of
13 Session 2010-2011 Privileges: Hacking of Members’ Mobile Phones). Contrary to Mr. Kramer’s claims,
14 he was in no imminent danger of fines or imprisonment as a practical matter, and he would have been
15 disabused of any such belief had he or counsel taken the reasonable and simple step of investigating these
16 issues before Mr. Kramer violated this Court’s orders.

17 **IV. RESPONSES TO COURT’S FACTUAL QUESTIONS**

18 In its November 20 Order, the Court asked Facebook to answer two additional questions.

19 **A. Defendant Has Offices in London. Is Defendant Subject to the J** 20 **DCMS?**

21 Defendant Facebook, Inc. is incorporated in Delaware and has a principal place of business in San
22 Mateo County. While the DCMS Committee does not have jurisdiction over Facebook, Inc., Facebook
23 has engaged extensively with the DCMS Committee over the course of its inquiry, answering hundreds
24 of questions, including during many hours of oral evidence by multiple senior individuals. Facebook UK
25 is located in London and therefore subject to Parliament’s jurisdiction.


1 **B. Has DCMS or Other Committee Served a Similar Demand for Unredacted**
2 **Sealed Documents on Defendant? If so, How Has Defendant Responded?**

3 At no time has the DCMS Committee requested from Facebook, or any of its subsidiaries, the
4 documents listed in its November 19, 2018 letter to Mr. Kramer.

5 Dated: November 28, 2018

DURIE TANGRI LLP

6
7 By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

8
9 Attorneys for Defendants
10 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
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12 Sukhar
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1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed in San
3 Francisco County, State of California, in the office of a member of the bar of this Court, at whose
4 direction the service was made. I am over the age of eighteen years, and not a party to the within action.
5 My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

6 On November 28, 2018, I served the following documents in the manner described below:

7 **DEFENDANT FACEBOOK, INC.'S BRIEF RE: COURT'S ORDER DATED**
8 **NOVEMBER 20, 2018**

9 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
10 Durie Tangri's electronic mail system from cortega@durietangri.com to the email
addresses set forth below.

11 On the following part(ies) in this action:

12 Stuart G. Gross
13 GROSS & KLEIN LLP
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20 *Attorneys for Plaintiff*
21 *Six4Three, LLC*

22 I declare under penalty of perjury under the laws of the United States of America that the
23 foregoing is true and correct. Executed on November 28, 2018, at San Francisco, California.

24 
25 _____
Christina Ortega